

Fair Political Practices Commission

Memorandum

To: Chairman Randolph
Commissioners Blair, Downey, Huguenin, and Remy

From: William L. Williams, Jr.
Acting Chief of Enforcement

Date: August 28, 2006

Subject: Evaluation of Streamlined Programs and Penalties
and Enforcement Division Recommendations

INTRODUCTON

At the Commission's February 16, 2006 meeting, the Commission requested that the Enforcement Division evaluate the current status of its streamlined programs as well as provide a discussion of their penalty histories.

The Enforcement Division currently operates three streamlined programs: 1) the Major Donor Streamlined Program (section 84200); 2) the Late Contribution Report Streamlined Program (section 84203); and 3) the Statement of Economic Interests Streamlined/Fast Track Program (section 87200). These programs are designed to encourage voluntary compliance with the reporting requirements, as well as impose uniform stipulations and penalties for certain types of violations as long as the respondent otherwise qualifies for the program.

MAJOR DONOR AND LATE CONTRIBUTION REPORT STREAMLINED PROGRAMS

The Act currently requires campaign donors who contribute \$10,000 or more in a calendar year to file semi-annual campaign statements (Major Donor Statements). (Government Code sections 84200 and 82013 subdivision (c).) In addition to the semi-annual campaign statements described above, the Act also requires that committees file late contribution reports (LCR's) within 24-hours of making a contribution if the contribution is made before the election but after the closing date of the last campaign statement is required to be filed before the election (Government Code sections 82036 and 84203).

Major Donor reporting provides the public with valuable information, by letting them see the scope of activity of the largest contributors supporting a candidate or measure. Late contribution reports from contributors continue to give the public important information in assessing efforts to influence elections by large contributors late in the election cycle. As these very large contributors include individuals and organizations, the public's ability to access this information based on the contributor's identity (as opposed to searching all potential recipients) remains an important informational tool for the public.

Background

Prior to the development of the streamlined programs, the Commission initiated major donor, late contribution, and SEI non-filer cases primarily through complaints received from the public. However, in August 1998, an overwhelming number of complaints were received by the Commission as civil demands. This provided the impetus to develop streamlined programs that would consistently and fairly prosecute major donor and late contribution reporting violations.

History of the Major Donor and Late Contribution Streamlined Programs

On September 10, 1999, the Commission adopted the Major Donor and LCR streamlined programs. The programs' goals were primarily twofold: 1) To create an efficient and fair process of prosecuting major donor and LCR violations; and 2) To set appropriate penalties.

The Commission decided to create a program that would expeditiously identify and prosecute major donor and late contribution reporting violations and would focus on compliance. The Commission adopted the following penalty structure for major donors:

- \$400 – \$600 for semi-annual campaign statement violations
- \$600 - \$800 for late contribution reporting violations
- Case-by-case for contributions over \$50,000

The Commission preferred a low, fixed penalty given the nature of the violation. The Commission's discussion reflected the belief that the penalty should be adjusted for higher contributions in light of the possibility of greater public harm.

Also on September 10, 1999, the Commission also adopted the streamlined LCR. Recognizing the importance of timely disclosing late contributions, the Commission adopted higher penalties: \$600 per violation for contributions under \$25,000 and \$1,000 per violation for contributions over \$25,000.

Modifications to the Major Donor and LCR Streamlined Programs

Since 1999, changes have been made to the streamlined programs. These changes include:

- Development of "proactive" programs to identify reporting violations utilizing electronic filing data available through the Secretary of State's office.
- Establishing criteria for excluding cases from the programs.
- Development of special "streamlined" settlement stipulations.
- Adjustments to the penalty schedules, creating penalty "tiers" and incorporating a percentage of the unreported contribution in the penalty structure.
- Separation of the original program, creating the two programs we now know as the LCR and Major Donor Streamlined Programs.

The Current Major Donor Streamlined Program

The Act currently requires donors contributing \$10,000 or more in a calendar year to file semi-annual Major Donor committee statements. In order to identify Major Donor non-filers, the Enforcement Division proactively obtains a database derived from recipient committee campaign statements electronically filed with the Secretary of State's Office which identifies contributions made to these committees, and compares this against any Major Donor filings with the Secretary of State.

If it appears a Major Donor has failed to file, the Division conducts an expedited written inquiry to ensure that the donor actually failed to comply, and requests input from the donor. The streamlined penalty is done "per count" based upon each instance the major donor failed to report as follows:

Enforcement Contact	Penalty Amount
<u>Tier 1:</u> Committee files late but voluntarily cooperates upon initial written contact.	\$400 per count
<u>Tier 2:</u> Committee files late, but voluntarily cooperates on second written contact.	\$800 per count
<u>Tier 3:</u> Committees that fail to cooperate after 2 or more written contacts requiring additional enforcement action.	15% of contribution up to statutory maximum per violation 25% of contribution up to statutory maximum per violation if a prior enforcement record exists for the same violation.
<u>Enhancement:</u> Committee that either contributes \$50,000 or more or makes ten or more contributions during a semi-annual reporting period.	Base penalty plus 1% of total contributed

The Current LCR Streamlined Program

On June 2, 2000, the Enforcement Division recommended adopting a percentage formula to calculate penalties for the LCR Streamlined program. The Division relied on a Federal Elections Commission proposed LCR approach which recommended assessing penalties of \$100 plus 15% of unreported contributions, with an enhancement to 25% of unreported contributions for repeat violators. The Division recommended a 15% penalty on unreported contributions and 25% penalty for repeat offenders with a \$2,000 cap. The \$2,000 cap was later increased to \$3,500. The Division did not believe that a flat-penalty structure captured the sliding scale of harm caused by increased undisclosed contribution amounts immediately prior to an election. The Commission adopted this approach.

Additionally, under the current LCR streamlined program, only late contributions aggregating \$10,000 or more, are brought into the program.

Qualifications for Participation in the Major Donor and LCR Streamlined Programs:

The Enforcement Division has retained prosecutorial discretion to exclude cases from this program under certain circumstances. Acting upon prior Commission guidance, the Division examines all cases involving a failure to report contributions of \$50,000 or more. The Division uses some of the criteria in Regulation 18361, subdivision (e)(4), as guidelines to evaluate a case for discretionary exclusion from the program:

- Evidence exists that the violator intended to conceal, deceive, or mislead;
- Evidence exists that the violation was deliberate;
- The violator is under current agency investigation or prosecution;
- There are prior prosecutions against the violator;
- The amount unreported would make the streamlined program inappropriate resulting in an injustice;
- The violator declines to participate in the streamlined program; or
- The overall circumstances are such that the streamlined program's application to a case would result in an injustice.

Enforcement Division Major Donor Streamlined Penalty Recommendations

Given the Major Donor streamlined program's purpose, the current penalty schedule has been effective. The penalties are appropriate given the violation's significance, staff resources, expediting resolution and in achieving efficiency.

If the major donor threshold is significantly increased by statute in the future, the Enforcement Division recommends adjusting the penalties to reflect this increase. Proposed legislation would increase the threshold to \$30,000. Currently, 75-80% of all major donor streamlined stipulations involve contributions between \$10,000 and \$15,000. Thus, major donors would involve a significantly smaller group than exists today, and given the proposed threefold contribution increase, would encompass more affluent persons or sophisticated corporate donors. *If the major donor filing threshold is changed upward*, the Enforcement Division recommends the following:

Enforcement Contact	Penalty Amount (if the threshold amount for major donor violations is increased to \$30,000)
<u>Tier 1:</u> Committee files late but voluntarily cooperates upon initial written contact.	\$1,000 per count
<u>Tier 2:</u> Committee files late, but voluntarily cooperates on second written contact	\$2,000 per count
<u>Enhancement:</u> Committee that either contributes \$100,000 or more or makes ten or more contributions during a semi-annual reporting period.	Base penalty plus 2% of total contributed up to maximum penalty

Additionally, it is recommended that the scope of the program be expanded to regularly include violations of up to \$150,000, with discretion to include cases up to \$200,000 on a case-by-case basis. For persons who do not meet the electronic filing threshold, a single count for the paper non-filing will continue to be the standard. However, for those meeting the electronic filing threshold, a single count of electronic non-filing will be the standard, in recognition of the importance of the electronic filing as the best means of informing the public of campaign financial activity.

The proposed increased penalty structure simply reflects that the program will now be oriented towards much larger contributions unreported.¹ These adjustments would make the penalties more commensurate with the severity of the violations in the program, as the \$1,000 base penalty would represent only 3.33% of the \$30,000 threshold amount for major donors. Increasing the scope of the program up to \$150,000/\$200,000 is a recognition of the need to expand the eligibility parameters of the program to reflect growth in contribution amounts. To some extent, larger aggregate contribution amounts are already being included in the program on a discretionary basis, but the scope of the program should be adjusted to reflect this reality. The increased scope of the program will allow the program to fulfill its primary function of expeditiously processing routine cases without unnecessarily burdening staff resources. As the penalty amounts are still low in comparison to cases processed outside of the program, and the standard will be a single electronic non-filing count for persons contributing \$50,000 or more, there should continue to be sufficient incentives for participation in the program. Another continuing incentive for participation in the program is that the Secretary of State's Office waives late filing fees for program participants. These fees can often be very substantial because the required campaign statements are often filed years after their due dates.

Finally, we would recommend that the criteria set forth above for discretionary exclusion from the program be maintained.

Enforcement Division LCR Streamlined Penalty Recommendation

The Enforcement Division recommends that the existing \$3,500 penalty cap be lifted. The original purpose of the cap was to build in an incentive for parties to participate in the streamlined program. In the recent past, private litigants have deluged the Commission with requests to civilly prosecute Major Donor and LCR non-filer cases, exceeding our capacity to prosecute and settle these cases within the 120-day period. The potential for such private civil prosecutions of major donor and LCR cases should provide a continuing incentive for participation in the LCR Streamlined program even without the cap, while allowing the program to impose penalties that are more commensurate with the amounts not disclosed.

THE SEI STREAMLINED PROGRAM

Pursuant to Chapter 7, Article 2 of the Political Reform Act, California public officials and some candidates for public office must report their economic interests on a Statement of Economic Interests (SEI). These reports are filed when a public official assumes office, leaves office, and on an annual basis while serving as a public official. Certain specified candidates for public office must file an SEI no later

¹ The former third tier of the program for persons who are contacted more than two times by the Enforcement Division is omitted because such cases are generally prosecuted outside of the streamlined program.

than the final filing date of a declaration of candidacy. The reports provide an important tool for the public to ascertain whether a public official has an economic interest in a decision.

History

On July 9, 1999, recognizing the need to obtain prompt compliance and to deter non-filing while minimizing the impact on Enforcement resources, the Commission adopted an SEI streamlined program. As originally enacted, the case was referred to an attorney to draft the stipulation, decision and order. The original program did not include the third-and-fourth-penalty tiers. On June 24, 2004, the Commission amended the program to adopt a standardized one-page stipulation, decision, and order which no longer needed attorney assignment, and additional penalty tiers were added as staff time increased.

Current SEI Streamlined Program

On June 24, 2004, the Commission adopted the current SEI streamlined program. The Commission recognized the strong public interest in the timely filing of SEI's and the need to resolve SEI non-filing cases expeditiously. The key program features include the following:

- The Enforcement Division has discretion to exclude any case from the program based upon aggravating circumstances, such as: prior non-filing history, prior prosecutions, or accompanying violations;
- Upon receiving a referral, the Enforcement Division must attempt to make telephone contact with the non-filer. If contact is made, the non-filer is informed of the importance of filing the SEI and advised to immediately file to obtain the smallest administrative penalty;
If compliance is not achieved, staff will send written notification to the non-filer;
- Assuming compliance is still not achieved, it is assigned out for further prosecution.
- Penalty structure:

Enforcement Contact	Penalty Amount
<u>Tier 1:</u> Initial telephonic contact. Statement filed and stip. returned in 15 days. (Max. 3 violations)	\$100
<u>Tier 2:</u> One telephonic and one written contact. Statement filed and stip. returned within 15 days of written contact. (Max. 3 violations)	\$250
<u>Tier 3:</u> One telephonic and one written contact. and attorney referral or probable cause report issuance Stip. reached after service.	\$500-\$700
<u>Tier 4:</u> One telephonic and one written contact and probable cause and accusation issuance. Stip. reached after service.	\$800-\$900

Enforcement Division Recommendation

SEI's continue to be important tools in the conflict of interest setting because they permit the public to assess public officials' economic interests in governmental decision-making. Prior to a case being referred to the Enforcement Division, Commission guidelines require at least two-written warnings be and in most instances additional telephonic contacts have been made or attempted. By the time of referral to the Enforcement Division, significant staff resources at the Commission or at the local level have already been expended to obtain compliance. Given these facts, the Enforcement Division recommends increasing the penalties, as follows:

Enforcement Contact	Penalty Amount
<u>Tier 1:</u> Initial telephonic contact. Statement filed and stip. returned in 15 days. (Max. 3 violations)	\$200
<u>Tier 2:</u> One telephonic and one written contact. Statement filed and stip. returned within 15 days of written contact. (Max. 3 violations)	\$400
<u>Tier 3:</u> One telephonic and one written contact and attorney referral or probable cause report issuance. Stip. reached after service.	\$600-\$800
<u>Tier 4:</u> One telephonic and one written contact and probable cause and accusation issuance. Stip. reached after service.	\$900-\$1,000

The above-recommended penalty modifications are more commensurate with the true public harm caused by SEI non-filers, and are more reflective of the numerous contacts that will have been made with a non-filer even at the first tier level, as well as through the subsequent tiers. Still, the very modest penalty amounts under the program will continue to give individuals sufficient incentives to participate in the program as compared with the potential \$5,000 maximum penalty per count, if the case is processed outside of the program.